GIANT BAY CAPITAL (HK) LTD.

v.

CAMPOC REALTY SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. D5-22-185-92]
25 MAY 1992

CIVIL PROCEDURE: *Injunction - Breach of agreements - Service contract - Whether injunction can be granted - Maintain status quo - Suppression of facts - Balance of convenience.*

The plaintiff owned the 5th defendant wholly and Richard Leibel was the managing director of it. To comply with Bank Negara requirements two agreements for sale and purchase of shares and joint management was entered into between the plaintiff and 6th defendant. As the 6th defendant did not maintain the representation the plaintiff terminated both agreements.

On 13 January 1992 pursuant to the extraordinary general meeting of the 5th defendant Richard Leibel was removed as managing director. The plaintiff in its application for injunction suppressed this fact. Further as a result of the injunction the 6th and 7th defendants had lost multi million ringgit development project with third parties involved.

Held:

[1] There is suppression of facts on the part of the plaintiff, hence the question of the balance of convenience did not arise and the injunction ought not to be granted.

[2] It was best under the circumstances to leave the matter at *status quo* as before the injunction granted on 11 February 1992 as the balance of convenience was in favour of the defendants, particularly the sixth and seventh.

[Plaintiff's application dismissed.]

For the plaintiff - K.S. Narayanan (Bryan Shankar with him); M/s. Chung & Shankar
For defendants, 1, 2, 3, 4, & 5 - C. Das (N. Balan with him); M/s. Shook Lin & Bok
For defendants 6 & 7 - M. Thomas; M/s. Matthew Thomas

JUDGMENT

Abdul Malek Ahmad J:

On 10 February 1992, the plaintiff had filed a summons in chambers *ex parte* upon a certificate of urgency for:

(a) an interim injunction to restrain and prevent the first, second, third and fourth defendants by themselves, their agents or nominees or otherwise howsoever from selling, transferring, voting in shareholder meetings or from dealing in any manner with the shares of the fifth defendant;

(b) an interim injunction to restrain and prevent the sixth and seventh defendants from doing, performing or carrying on any executive or director functions or duties in the fifth defendant until further order of the Court;

(c) an interim injunction to restrain and prevent the sixth and seventh defendants by themselves, their employees, servants, agents or nominees or otherwise howsoever from interfering in any manner with Richard J. Leibel in the proper execution of his duties as managing director of the fifth defendant;

and such other further relief and costs.

On 11 February 1992, prayers (a), (b) and (c) were granted on the basis of the plaintiff's undertaking for damages and that it was only in the interim until the matter was heard *inter parte* on 27 February 1992. By an *ex parte* summons in chambers also filed upon a certificate of urgency on 14 February 1992, the sixth and seventh defendants had applied that the *ex parte* order obtained by the plaintiff on 11 February 1992 namely paragraphs (b) and (c) be set aside or varied. The order was granted on the same day. On 27 February 1992, learned Counsel for the plaintiff applied for an early date to record the evidence of the fifth defendant's company secretary and since learned Counsel for the first to the fifth defendants and learned Counsel for the sixth and seventh defendants had no objections, the matter was set down for hearing on 5 March 1992.

Before me on that date, learned Counsel for the plaintiff had submitted that the plaintiff was a company based in Hong Kong and a subsidiary of a Canadian public company. The plaintiff owned the fifth defendant wholly and had been ordered by Bank Negara Malaysia to be one hundred per cent local by 28 February 1992. Consequently, two agreements were made with the sixth defendant, one for the sale and purchase for 4.5 million ringgit and the other for the purchase of 4.5 million ringgit of shares for joint management. These were necessary for Canadian tax reasons and to obtain the approval of the Foreign Investment Committee.

He added that the purchaser was the first defendant which was the family company of the fifth defendant and prior to the sale there was a substantial loan from a local bank to the fifth defendant. Learned Counsel for the plaintiff had contended that the sixth defendant did not maintain the representations made and although the 4.5 million ringgit under the sale and purchase agreement was paid, the payment under the joint management agreement was not. As such, the plaintiff had terminated both agreements on 29 January 1992.

Learned Counsel further submitted that Richard Leibel, the director of the plaintiff, had gone to his office in Kuala Lumpur where he was managing director of the fifth defendant in early February to find the place locked up. He later received the termination notice on consequence of which he had applied for the said injunction. He obtained the order on 11 February 1992 and, after some communication difficulties, it was served on the sixth and seventh defendants on 13 February 1992. The following day, as stated earlier, the sixth and seventh defendants had obtained an order to set aside the earlier injunction.

Learned Counsel for the first to the fifth defendants submitting for his clients as well as for learned Counsel for the sixth and seventh defendants had referred to the emergency board meeting of the fifth defendant on 6 December 1991 which the sixth and seventh defendants had attended together with Richard Leibel to discuss the splitting of share certificates, the approval of transfer shares, and any other matters, with one Ms. Cheai Guan Foon attending as company secretary.

He had also referred to the notice of the extraordinary general meeting of the fifth defendant which was fixed on 13 January 1992 with the following agenda:

1) **Ordinary Resolution 1**

That effective 30 January 1992, Mr. Richard Leibel be and is hereby removed as director, managing director and president of the Company.

2) **Ordinary Resolution 2**

That Mr. Richard Leibel be and is hereby irrevocably prohibited from acting as director, managing director or officer of the Company for five (5) years from 30 January 1992.

3) **Ordinary Resolution 3**

That the appointment of Mr. Tam Kim Wah who is holding other office of profit, as executive chairman and director of the company at RM10,000 monthly, all expenses and allowances be and is hereby ratified and approved.

4) **Ordinary Resolution 4**

That the appointment of Mr. Tam Kim Yeow who is holding other office of profit, as executive director and director of the company at RM5,000 monthly, all expenses and allowances be and is hereby ratified and approved.

5) Any other matter.

It is pertinent to note that in both his affidavit in support of the plaintiff's application for the injunction and in the subsequent statement of claim, Richard Leibel did not raise the matter of these two meetings which had the effect of terminating his directorship. Learned Counsel for the plaintiff in his arguments did not seriously dispute the fact of his attendance and consequently the Court must take the stand that Richard Leibel was present and was aware of the decisions at the meeting. As such, the non-disclosure of these material facts are by itself good grounds for not granting the injunction applied for as Richard Leibel very well knew on 11 February 1992 that his executive position had ended but did not say so in his application. Applying for an injunction as a result of dismissal, which the board was entitled to do, was certainly a drastic step. Being granted the injunction would have added salt to the wound as far as the defendants were concerned in that it would have the effect of taking the management of the fifth defendant out of the sixth and seventh defendants who owned fifty one per cent and therefore the majority share. As stated in the Specific Relief Act 1950, it is trite law that a service contract would not be specifically enforced by the Court and that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

Further, on the grant of the injunction on 11 February 1992, Richard Leibel had immediately made one Joseph Stecker co-signatory for all the fifth defendant's cheques. Learned Counsel for the first to fifth defendants had referred me to a letter from Richard Leibel appointing Joseph Stecker as personal assistant to the managing director dated 28 August 1991 at one ringgit per year. As a result of that letter, Joseph Stecker had subsequently been told by a letter from the sixth defendant dated 6 September 1992 that his presence on the company's premises was illegal. Learned Counsel had also referred me to several exhibits annexed to the sixth defendant's affidavit filed on 27 February 1992 showing Richard Leibel using the fifth defendant's letterheads for varied unauthorised activities namely at exhibit "W".

Learned Counsel had also reiterated that the effect of the injunction granted to the plaintiff on 11 February 1992 meant that the sixth and seventh defendants had lost control of everything including a multi million ringgit development project with third parties involved. He further stated that in the forty-eight hours after the injunction, Richard Leibel had swiftly taken steps to appoint others, including Joseph Stecker, as cosignatories and making other

plans for the fifth defendant. Learned Counsel had also explained that the fact that Richard Leibel found the office locked in early February was because it was closed for the Chinese New Year holidays.

Having considered the arguments and affidavits based on decided authorities, it was my view that the issues of the two agreements for sale and purchase and joint management of the shares, and Richard Leibel's removal, were just two of the issues which had raised serious questions to be tried and that it was best in the circumstances to leave the matter at *status quo* as before the injunction granted on 11 February 1992 as the balance of convenience was in favour of the defendants, particularly the sixth and seventh defendants, who had the majority share in the fifth defendant which was involved in a multi million ringgit project, rather than with the plaintiff whose deponent Richard Leibel's managing directorship had been terminated and, although this was in issue, damages would suffice to serve as an adequate remedy, and furthermore the plaintiff was a foreign company with no tangible assets within the jurisdiction. In fact, once I had found that there had been a suppression of facts on the part of the plaintiff as regards his termination of service, the question of the balance of convenience did not arise and the injunction ought not to be granted without the need to consider the other factors.

It is also relevant to point out here that the order for the recording of the evidence of the company secretary was later found to be quite unnecessary as all learned Counsel had agreed before submissions began that it could be dispensed with and that the matter be decided purely on the arguments based on the affidavits.

I had accordingly decided to dismiss the plaintiff's application for the injunction with costs and had directed the learned Senior Assistant Registrar to ascertain damages, if any, sustained by the defendants by the grant of the said injunction before the application for the second injunction by the sixth and seventh defendants for which I had made no order in the circumstances.

Also found at [1992] 3 CLJ 1713